FILED

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No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

FRANCIS FERRI

Petitioner,

- against

COMMONWEALTH OF PENNSYLVANIA

Respondent,

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. WHETHER A STATE COURT MAY COMPEL AN ATTORNEY AND HIS EXPERT TO TESTIFY, UNDER FEDERAL CONCEPTS, TO REPRESENTING THE CLIENT IN THIS CASE, WORK PRODUCT OPINIONS AND TO THE RECEIPT OF EVIDENCE FROM THE CLIENT FOR PURPOSES OF INTRODUCING THE EVIDENCE IN A CRIMINAL TRIAL?

2. WHETHER DUE PROCESS IS VIOLATED WHEN

(a) FOLLOWING THE PROSECUTOR'S REQUEST BEFORE THE JURY, THE COURT STOPS A TRIAL AMID THE TESTIMONY OF THE LAST DEFENSE WITNESS, AND PERMITS THE STATE TO CONDUCT AND INTRODUCE A SCIENTIFIC TEST, CONTRARY TO A PRETRIAL AGREEMENT?

(b) THE PROSECUTOR'S CLOSING ARGUMENT INTRODUCES A NEW SCIENTIFIC CONCLUSION TO INCRIMINATE THE ACCUSED REGARDING EVIDENCE THAT NEITHER THE STATE OR THE DEFENSE EXPERTS COULD REACH?

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JURISDICTIONAL STATEMENT

The Order of the Pennsylvania Supreme Court denying Petitioner's petition for Allowance of Review was filed on June 10, 1993. See App. Pages 27 and 28.

The Opinion of the Pennsylvania Superior Court affirming the conviction is reported at Com v. Ferri, 500 A. 2d 208 (Superior 1991). See App. Pages 1 through 26.

The jurisdiction of this Court is invoked pursuant to Title 28, U.S.C. Section 1257.

That is, a state court has rendered a decision that is repugnant to the constitution and laws of the United States.

OPINION BELOW

The opinion below is reported at Com v. Ferri, 599 A. 2d 208 (Pa. Superior 1991). A copy of that opinion is attached hereto as an Appendix, pages 1 through 26.

A copy of the Pennsylvania Supreme Court's Order denying review is attached as Appendix 27.

INTERESTED PARTIES

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CONSTITUTIONAL PROVISIONS

The attorney-client and the attorney work-product privileges as they attach to our adversarial system and an accused Sixth Amendment right to the effective assistance of counsel.

The Due-Process Clause of the Fifth Amendment.

STATEMENT OF THE CASE

On April 21, 1983, Petitioner (Ferri) and Anthony LaRocca were charged with the murder of Jocko Heatherington, conspiracy thereto, and a conspiracy to distribute cocaine in the court of Common Pleas, Allegheny County, Pa.

On April 30, 1984, the state appealed the order severing the cocaine charges from the murder charges. The order was affirmed at Com v. LaRocca, No. 533 PGH 84 (Superior 1986).

On remand Ferri's murder trial was severed from LaRocca's due to Bruton problems. Ferri was convicted by a jury in June of 1987.

The conviction was affirmed on appeal at Com v. Ferri, 599 A. 2d 208 (Superior 1991). A petition for Allowance of Appeal to the Supreme Court of Pennsylvania was denied on June 10, 1993, at No. 0354 W.D. Allocator Docket 1992.

STATEMENT OF THE FACTS

Jocko Heatherington was slain in a motel parking lot. He was shot six times with a 22 caliber pistol from a range of less than 36

inches. Petitioner (Ferri) departed the motel 10 minutes earlier from a meeting with the victim in the motel lobby.

The next day Ferri's counsel advised him of the murder and that he was the prime suspect. Ferri delivered the clothing he wore to the motel tc attorney Leonard Sharon. Days later an informant recorded Ferri's conversation that the clothing was in Sharon's office.

Ferri and Anthony LaRocca were charged with this murder. Trial delays ensued and Sharon withdrew representation. Diane Barr Quinlin became counsel of record. She took Ferri's clothing (pants & shirt) to the state crime lab for a ballistic examination. Robert Levine examined the clothing, filed a report, and returned the clothing.

Quinlin withdrew and attorney Lawrence O'Toole became counsel of record. Prior to trial the court ruled that Ferri waived the attorney client and attorney work product privileges by disclosing to an informant that

the clothing was in Sharon's office.

The court then ordered Sharon and Quinlin to testify to representing Ferri in this case, receipt of the clothing from Ferri and to identify the clothing. Levine was compelled to testify to representing Ferri in this case, and to his work product opinions performed as Quinlin's expert.

Before trial Levine and Ferri's expert examined the clothing and performed a ballistic test. Trial commenced on May 21, 1987, five years after the murder. There are no eyewitnesses, no confessions, no accomplice co-conspirator testimony, no smoking gun evidence.

Ferri was found guilty. On appeal the conviction was affirmed. The Pennsylvania Supreme Court denied review.

WHETHER A STATE COURT MAY COMPEL AN ATTORNEY AND HIS EXPERT TO TESTIFY, UNDER FEDERAL CONCEPTS, TO REPRESENTING THE CLIENT IN THIS CASE, WORK PRODUCT OPINIONS AND TO THE RECEIPT OF EVIDENCE FROM THE

CLIENT FOR THE PURPOSES OF INTRODUCING THE EVIDENCE A CRIMINAL TRIAL?

At the trial Sharon was compelled to testify to: representing Ferri in this case; the date of and the receipt of the clothing from Ferri, and to identify the clothing. Quinlin was compelled to testify to representing Ferri in this case, the dates thereto, receipt of the clothing from Sharon, and the delivery and return receipt of the clothing from Levine in 1985.

Levine was compelled to testify to being Quinlin's and by proxy Ferri's expert; that he received the clothing from Quinlin in May of 1985; he was requested to perform a ballistic examination; and to his work product opinions performed at Quinlin's bequest. Trial continued for three weeks. A jury found Ferri guilty, but declined to impose the death penalty.

On appeal Ferri argued that disclosing to an informant that his clothing was in Sharon's office does not constitute a waiver of the

attorney client or the attorney work product privileges.

The Superior Court ruled that whether Ferri waived the attorney client privilege was not the issue. The state was entitled to Sharon and Quinlin's testimony "to establish the chain of custody and authentication of the clothing" (App. 5). That "the privileged communications remained protected to the extent possible" (App. 5). Ferri could have avoided this problem via "a stipulation that was offered but not accepted". (App. 5).

Ferri contends the Superior Court's opinion is repugnant to federal concepts regarding the compelled breach of the attorney client and the attorney work product privileges. Under the Superior Court's aegis, the criminal defense attorney must now give his client a (Miranda) warning.

When a state prisoner seeks certiorari from an opinion of the state court of last resort the standard of review is : whether the opinion on

a given question is "repugnant to the Constitution, treaties, or laws of the United States" with respect to "a right [or] or statutes [] or authority exercised under the United States "Title 28, U.S.C., §1257 (3), and Rule 17 (b) & (c), Rules of the United States Supreme Court.

Under federal concepts, the attorney client privilege is not protected under the Constitution. However, absent the privilege, our adversarial system of jurisprudence would collapse because "damaging information [obtained from the client] could more readily be obtained from the attorney" Fisher v. United States, 48 L. Ed 39-51 (1976). This Court held in Fisher that enforcement of a subpoena on an attorney or an accountant for documents obtained from their client was not a violation of the privilege.

However, "the act of producing evidence in response to subpoena nevertheless has communicative aspects of its own, wholly aside from the contents of the papers produced" 48 :/

Ed 2d at 56.

The attorney or accountant who introduces these documents in court "is compelled to make a testimonial communication that is incriminating" to his client, 48 l. Ed 2d at 54.

This Court's reasoning in Fisher is followed by the Federal Appellate Courts and the State Supreme Courts.[1]

The principle of law made clear in each of these opinions is that: when an attorney receives physical evidence of a crime from his client he must deliver the evidence to the state. However, at the trial "the source of the

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[1] Clutchette v. Rushen, 770 F.2d 1469 (9th Cir. 1985); Bill v. Green, 493 So. 2d 1178 (La. 1986); State v. Olwell, 394 P. 2d 681 (Wash. 1964); Anderson v. State, 297 So. 2d 871 (Fla. 1974); People v. Nash, 313 N.W. 2d 307 (Mich. 1981); People v. Meredith, 175 Cal. R. 612 (Cal. 1981).

Under the "last link" doctrine federal appellate courts have quashed grand jury subpoenas when "the disclosure of the client's identity by his attorney would have supplied the last link in a chain of incriminating evidence likely to lead to the client's indictment" In Re Grand Jury, 765 F.2d 1015-1018-19 (11th Cir. 1985); In Re Grand Jury, 947 F.2d 1188 (4th Cir. 1991).

information leading to [its] discovery [and] the role [of] the attorney or investigator in the defense" is protected under "the communicative aspects" of the attorney client privilege.

Therefore, with respect to the compelled breach of the attorney-client privilege: the opinion below, sanctioned by the state court of last resort, "has decided a federal question in a way in conflict with the decision of another state court of last resort or a federal court of appeals" Rule 17 (b), Title 28, Rules of the Supreme Court of the United States.

On another footing "the work-product doctrine is distinct from and broader than the attorney/client privilege" United states v. Nobles, 45 L. Ed 2d 141-153 fn (1975). When Quinlin "intervened" to the compelled "disclosure of [Levine's] work product" she was within her rights to do so, Appeal of Hughs, 633 F. 2d 282-286 (3rd Cir. 1980). The work-product privilege was the fruit of the attorney-client relationship Quinlin had with Ferri. Therefore,

Ferri has standing to assert the privilege regarding Levine's compelled disclosures, 633 F.2d at 286.

Levine was compelled to disclose the work product opinions he performed for Quinlin as a ballistic expert. That is he "recognized Ferri's name on the shirt collar and associated the clothing with this case." That he "found four powder particles on the clothing" which in his opinion had "the same characteristics" as the gun powder used in the "ammunition" to slay the victim. That when he "dissolved" these particles "in acetone" it proved they were "gun powder."

Ferri argues that these compelled disclosures violated Quinlin;s work product privileges under federal concepts. It also violated Ferri's attorney-client privileges and his right to the effective assistance of counsel under the Sixth Amendment.

Ferri contends that certiorari should be granted because the lower court's opinion is in

conflict with the opinions of the federal appellate courts, the state courts of last resort, and the Untied States Supreme Court.

If the opinion below is permitted to remain intact, and encroachment of that opinion takes its toll, the Pennsylvania system of jurisprudence is in jeopardy, and the power of this court will be summoned to remedy the problem.

WHETHER DUE PROCESS IS VIOLATED WHEN (a) FOLLOWING THE STATE'S REQUEST BEFORE THE JURY, THE COURT STOPS A TRIAL AMID THE TESTIMONY OF THE LAST DEFENSE WITNESS, AND PERMITS THE STATE TO CONDUCT AND INTRODUCE A SCIENTIFIC TEST, CONTRARY TO A PRETRIAL AGREEMENT?

(b) THE PROSECUTOR'S CLOSING ARGUMENT INTRODUCES A NEW SCIENTIFIC CONCLUSION TO INCRIMINATE THE ACCUSED REGARDING EVIDENCE THAT NEITHER THE STATE OR THE DEFENSE EXPERTS COULD REACH

Prior to trial the court ordered the defense to deliver the clothing to the state. At that time the parties agreed, with the court's sanction, that all tests performed on the clothing be completed before trial and in joint fashion.

On the eve of trial a joint examination of the clothing took place. A powder particle was discovered. Levine destroyed that particle in an SEM-EDX text, which is inconclusive for the presence of gun powder.

Thereafter, both experts filed their reports and the cause proceeded to trial. Levine, who played two roles in this case, testified on two occasions.

He first testified that the evidence recovered from the murder scene led to these conclusions: The murder weapon (not recovered) was a 22 caliber Ruger pistol (probably equipped with a silencer) using Winchester Super X ammunition. The victim was shot from a range of less than 36 inches (less if the silencer was

used) because the black sooting smudges on his wounds where the bullets entered his body proved this.

Levine then testified to his work product opinions performed at Quinlin's bequest. On his next trip he testified that in his opinion the SEM-EDX test proved the powder particle found on Ferri's clothing was gun powder similar to Winchester Super X ammunition. He then removed the head from a sample 22 caliber Winchester Super X bullet and placed as an exhibit the gun powder contained in the shell casing. He concluded that this "eliminated Ferri as the Shooter." The powder particles were "acquired from an environment where a weapon was discharged."

During Levine's two trips to the witness stand (200 pages of transcripts) no mention of an infra red test emerged on direct or cross-examination.

The last witness was George Fassnaught, Ferri's ballistic expert. He agreed with

Levine's analysis of the crime scene evidence. He concluded that the particles could have been any one of a dozen items with similar characteristics and named a few. Since the last particle was destroyed in the SEM-EDX test the matter was inconclusive. If the particles were gun powder it was "inconsistent with Ferri being at the murder scene." Since the victim was shot from a range of less than 36 inches (slightly more than arm's length) Ferri would have had to "be in the line of fire" to acquire the particles on his clothing. There were no bullet holes in the clothing.

On cross-examination, over objections, the state initiated a series of questions regarding the absence of an infra red test.

Whether that test would have been conclusive for the presence of gun powder on the clothing. Fassnaught responded: "yes."

In a dramatic and theatrical ploy before the jury the state moved to stop the trial, and for an order to conduct an infra red test. For

the next few moments pandemonium reined in the courtroom. The jurors oh'd and ah'd, the spectators gasped, the defense objected, and the prosecutor smiled. Finally, the jurors were excused and conference ensued.

Ferri moved for a mistrial on the basis that: The jury was left with the impression the defense was evading the infra-red test; the belated request violated a pretrial agreement that all tests be conducted before trial an in joint fashion. The court agreed "no question about that."

The state admitted the test could have been conducted before trial "it only takes an hour" however, the prosecutor "didn't trust him . . . he wanted to wait and see what [Fassnaught] would say first." Ferri argued there were no particles left to test. Had the infra red test been conducted before trial the defense would have pursued a wholly different trial strategy,

and sought an neutron activation test.[2]

Nevertheless, the court stopped the trial and ordered the infra-red test. At the local crime lab, Levine produced another particle that tested positive for "nitrocellulose" and element of gun powder. The results of the test were introduced during the continued cross examination of Fassnaught.

On appeal the court held that "the [state] laid a proper foundation for the admissibility of the test . . . the test is dispositive, and would assist the fact finder . . . a stipulation is mentioned in both counsel's brief, it is not a fact of record" (App. 6).

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[2] Ammunition manufactures perform a neutron activation test on each batch of ammunition produced for insurance purposes. The test determines to a millionth of a percentage point the amount of each element used in the gun powder. No two batches produced the same test results. Since the murder occurred in 1982, and a mysterious particle emerged in 1987, the state avoided this test by laying in ambush until the end of the trial.

This test requires the special equipment of the FBI or ATF in Washington, D.C. and must be arranged days in advance. See United States v. Stifel, 433 F.2d 431-436 (6th Cir. 1970).

Ferri argues the opinion is repugnant to "the due process clause" of the U.S. Constitution by sanctioning "trial by ambush" United States v. Kelly, 420 F.2d 26 (2nd Cir. 1970); United States v. Barrett, 703 F.2d 1076-1080 (9th Cir. 1983); United States v. Edwards-Franco, 885 F.2d 1002-1009 (2nd Cir. 1989). In Kelly two N.Y. City detectives were convicted for withholding a portion of the narcotics seized during a state arrest, and later sold to a government agent. At their trial the question was whether the narcotics sold to the agent came from the same batch seized in the state arrests.

Before trial the government disclosed "the chemical analysis of the drugs in the indictment" (purity percentages) ib at 28.

In mid trial the government introduced the results of a "neutron activation test which tended to show that the drugs all came from the same original batch. [However] the government did not inform the defense of this test" before trial, in at 28.

On appeal the court reversed because the mid trial disclosure of the neutron activation test "smacks too much of a trial by ambush . . . A due process violation" ib at 29.

When the lower court held the state laid the proper foundation, it missed the point. Laying the belated foundation, like in Kelly, was part and parcel of the ambush. It precluded Ferri from performing an opposing test. When the lower court held the test was dispositive and would assist the fact finder, it missed the point anew. The question for the jury was: if it was gun powder: was it "acquired from an environment where a weapon was discharged" (Levine) or was it "inconsistent with Ferri being at the murder scene" (Fassnaught).

Only a neutron activation test would have resolved the question in dispute.

The lower court noted that "a stipulation is mentioned in both counsel's briefs . . . it is not a fact of record. Accordingly this court cannot assess whether the stipulation was

breached" (App. 6).

Ferri argues the court's analysis is repugnant to federal concepts regarding stipulations. That is, once both parties agree that a given stipulation was reached, it is not the province of the court to undermine the stipulation. Utah v. United States, 22 L. Ed 2d 99 (1969); National Bank v. Cities Service Co., 20 L. Ed 2d 569 (1969).

(b) THE PROSECUTOR'S CLOSING ARGUMENT INTRODUCING A NEW SCIENTIFIC CONCLUSION REGARDING EVIDENCE TO INCRIMINATE THE ACCUSED THAT NEITHER EXPERT COULD CONCLUDE VIOLATES FEDERAL DUE PROCESS CONCEPTS.

At the close of the testimony the question for the jury was whether the particles were "acquired in an environment where a weapon was discharged" (state) or were "inconsistent with Ferri being at the murder scene" (defense).

Since the victim was shot from a range of less than 36 inches, this eliminated Ferri as the shooter (state). It remained a mystery how

Ferri got the particles on his clothing since he was not "in the line of fire" (defense).[3]

The prosecutor solved this scientific dilemma during the rebuttal portion of his closing argument. More ambushing.

He argued that while LaRocca was shooting the victim, the silencer fell off the murder weapon. "Ferri picked up the silencer and placed it in his shirt pocket. The powder particles fell out of the silencer into his pocket."

This was an impossible scenario, however the defense was precluded from presenting a contra argument as the state laid in ambush before presenting this argument.[4] Ferri argues

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[3] Fassnaught explained that when a 22 caliber pistol using Super X ammunition is fired 99.99% of the gun powder explodes and converts to black sooting. The sooting and a few unexploded particles trail the bullet head out of the barrel for approximately 18 to 30 inches. That's how the sooting smudges got on the victim's wounds. There was no black sooting on Ferri's white shirt or tan slacks.

[4] Levine explained that if the silencer was used it fell off the gun during firing. That the silencer was "full of soot [from] burnt

that federal due process concepts bar a party from introducing a scientific conclusion, that neither the state or the defense expert could reach, during closing arguments, United States v. Morris, 568 F.2d 396 at 401 (5th Cir. 1977) ("summations . . . [are] not for the purpose of permitting counsel to 'testify' as an 'expert witness'.")

United States v. Birdman, 602 F.2d 547 (3rd Cir. 1979) (the double role of advocate and witness by the prosecutor is universally frowned upon). United States v. Giovanelli, 945 F.2d 479-493 (2nd Cir. 1991) (Prosecutor's playing tapes for the first time in rebuttal argument denied the defense an opportunity to respond).[5]

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powder particles." The same black "sooting" as found on the 'victim's head wounds."

If unexploded powder particles fell out of the silencer into Ferri shirt pocket, then, likewise so would have 1,000 burnt sooting particles have fallen into the pocket.

[5] This case has all the earmarks of the knowing use of false evidence, Miller v. Pate, 17 L. Ed 2d 690 (1967). Miller was convicted of the murder of a girl resulting from a sexual attack. The state's expert testified that a pair of shorts, alleged to be Miller's had blood

Ferri argues that certiorari should be granted because the lower court's opinion with respect to the belated infra-red test, the stipulation, and the ambushing tactics including the closing argument is repugnant to federal due process concepts.

CONCLUSION

Certiorari should be granted because the opinion below is repugnant to the Constitution and laws of the United States in these respects:

1) The opinion sanctions the state's intrusion into the attorney-client and the attorney work-product privileges for purposes of introducing testimonial communications that are incriminating to a client.

2) The opinion sanctions trial by ambush by permitting a state to defer a scientific test simply by laying the foundation for same during the course of a trial.

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stains on them of type A, the same as Millers. On habeas corpus in federal court a microanalyst testified that the reddish-brown stains on the shorts were not blood stains, rather paint stains.

The prosecutor may introduce his scientific conclusions, not in evidence, during closing arguments.

DATED: Nov. 11, 1993

Respectfully submitted,

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APPENDIX

COMMONWEALTH of Pennsylvania

v.

Francis FERRI, Appellant.

Argued Sept. 11, 1991.
Filed Oct. 9, 1991.

Defendant was convicted of first-degree murder and conspiracy to commit murder following jury trial in the Court of Common Pleas of Allegheny County, Criminal Division, No 8307144, McGregor, J., and he appealed. The Superior Court, No. 133 Pittsburgh 1990, Montemuro, J., held that: (1) four-year delay incident to Commonwealth's interlocutory appeal of severance order was excludable time under speedy trial rule; (2) attorney-client privilege did not preclude testimony by two of defendant's former attorneys, for foundation purposes, that defendant had delivered to attorney clothing he wore on the date of the murder; (3) there was no abuse of discretion in permitting testing of the clothing for gun powder during trial, despite claim of surprise; and (4) tape recording

admitted to corroborate witness's testimony and rebut any implication that he had fabricated testimony as to solicitation to commit murder was not hearsay.

Affirmed.

1. Criminal Law (West Key # Sys.) 1077.3

Superior Court was precluded, on appeal from conviction, from considering pro se brief where separate brief was filed by counsel.

2. Criminal Law (West Key # Sys.) 577.10(8)

Four-year delay incident to Commonwealth's interlocutory appeal from order severing drug conspiracy charges from homicide charges was excludable time under speedy trial rule and did not prejudice defendant's rights, despite claim that the delay prejudiced defendant's ability to call certain alibi witnesses. Rules Crim.Proc., Rule 1100, 42 Pa.C.S.A.

3. Witnesses (West Key # Sys.) 219(3)

Defendant's disclosure to third person that he had delivered to his attorney clothing that he wore on date of homicide did not waive

attorney-client privilege with respect to attorney's testimony regarding the clothing.

4. Witnesses (West Key # Sys.) 198(2)

Attorney-client privilege did not precluded defendant's former attorneys from testifying in homicide trial that defendant had delivered to them clothing worn by him on the date of the homicide, which was required to establish chain of custody with respect to the clothing; nonprivileged evidence did not become protected merely by delivery to attorney, and the defense could have eliminated need to call attorneys to testify by stipulating to authenticity of the physical evidence.

5. Criminal Law (West Key # Sys.) 650

There was no abuse of discretion in permitting infared testing of clothing for gun powder during cross-examination of defense expert witness in murder prosecution after that witness, who had challenged conclusiveness of test used by prosecution expert, had agreed that infared testing would be determinative, despite

contention that testing during trial resulted in unfair surprise.

6. Criminal Law (West Key # Sys.) 742(1), 1158(4)

Credibility of witness was for the trial court in determining whether defendant had waived attorney-client privilege with respect to one of his former attorneys, and absent manifest error or decision that was arbitrary and capricious, Superior Court was bound by the trial court's determination.

7. Witnesses (West Key # Sys.) 414(1)

Tape recording of conversation between witness and third person, including references to prior solicitation to commit murder, was not hearsay where admitted to corroborate the witness's testimony and to rebut any implication that he had fabricated the solicitation.

8. Criminal Law (West Key # Sys.) 1153(1)

Trial court's determination that evidence is not cumulative will not be disturbed absent abuse of discretion.

9. Criminal Law (West Key # Sys.) 1153(1)

Trial Court's ruling on balance of prejudicial effect of evidence against its probative value will not be disturbed absent abuse of discretion.

Stanley W. Greenfield, Pittsburgh, for appellant.

Kevin F. McCarthy, Asst. Dist. Aty., Pittsburgh, for Com., appellee.

Before OLSZEWSKI, MONTEMURO and HOFFMAN, JJ.

MONTEMURO, Judge:

This is an appeal from a judgement of sentence entered following appellant's jury conviction on charges of first degree murder and conspiracy to commit murder. On April 28, 1983, the appellant, Francis Richard "Rick" Ferri was indicted with Anthony LaRocca for the August 2, 1982 slaying of their drug distribution partner John "Jocko" Heatherington. Heatherington, at the time of his murder, was under a federal grand jury indictment for drug distribution charges. Ferri and LaRocca discussed killing Heatherington to prevent the potential disclosure of their drug distribution network.

On August 2, 1982, Ferri met Heatherington

at the Quality Inn Motel on Route 30, North Versailles, Pennsylvania. Ferri and Heatherington were seen together between 10:15 and 10:50 pm. Heatherington was shot in the hotel parking lot at approximately 11:00 pm. He died one month later from multiple gunshot wounds to the head. Ferri was charged with one count of criminal homicide 18 Pa.C.S. § 2501(a); one count of criminal conspiracy to commit homicide, 18 Pa.C.S. § 903(a)(1); and one count of conspiracy to distribute cocaine 18 Pa.C.S. 903(a)(1). On April 9, 1984, the trial court granted defendant's motion to sever the drug conspiracy charges as to each defendant from the homicide charges. The Commonwealth appealed this decision to the superior court which affirmed, and denied a hearing *en banc*. On May 6, 1986, the Commonwealth petitioned the Supreme Court for allocator. This petition was denied on December 30, 1986. On January 16, 1978, the record was remanded to the Court of Common

Pleas.[1]

[1] The Commonwealth requested and was granted its motion to sever the trial of LaRocca and Ferri. Ferri, after a trial by jury, was found guilty of first degree homicide and conspiracy to commit homicide. The sentence imposed was five to ten years for the conspiracy charge, and life imprisonment for the homicide conviction. Thirty-one post trial motions were timely filed and subsequently denied on July 28, 1989. Five issues raised by post-verdict motion are the subject of this appeal from the judgment entered. Ferri also raises five additional issues pre se. This court, however, is precluded from considering a pro se brief where a separate brief has been filed by counsel. *Commonwealth v. Ellis*, 398 Pa.Super. 538 A.2d 595 (1990). Accordingly, Ferri's additional contentions are not discussed in this Opinion.

[2] The first issue properly raised on appeal

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[1] Ferri's conspiracy to distribute cocaine charge is the subject of a separate appeal.

is whether the four year delay incident to the Commonwealth's interlocutory appeal and subsequent petition for allocator violated Pa.R.Crim.P. 1100. In addition, Ferri asserts that the delay prejudiced his ability to call certain alibi witnesses. The trial court correctly determined that the appeal was proper, and that the time during this permissible interlocutory appeal is excludable time.

Furthermore, the trial court properly held that the four year delay did not prejudice the defendant's rights. (T.C.O. at 15). An "interlocutory appeal by the Commonwealth tolls Rule 1100, compels the conclusion that defendant was timely tried." *Commonwealth v. Coleman*, 341 Pa.Super. 160, 163, 491 A.2d 200, 201 (1985). The court in *Coleman*, also noted that the Supreme Court in *Jones v. Commonwealth*, 495 Pa. 490, 434 A.2d 1197 (1981) "held that the defendant's dubious claim of prejudice to his defense could not outweigh the Commonwealth's entitlement 'to seek appellate review of what it

considered to be the improper suppression of important evidence in a first degree murder trial.'" Coleman, 341 Pa.Super. at 160, 491 A.2d at 203 *quoting Jones*, 495 Pa. at 500-01, 434 A.2d at 1202. Thus, Ferri

s first contention is without merit.

[3,4] The second issue raised on appeal is whether the trial court erred in admitting the testimony of Ferris former counsel over the objection that the testimony was privileged.

This issue arises from the following facts: The day after the victim was killed, attorney Leonard Sharon notified Ferri that Heatherington had been shot the night before. The Appellant immediately took the clothes he had been wearing the night of the shooting to Sharon's office. Claudia Sharon, Leonard's wife and law partner, received the clothing and gave them to Leonard Sharon. Mr. Sharon, upon termination of his representation of Ferri, turned the clothing over to Dianne Bar Quinlin, former member of the Allegheny County Public Defender's office. Ms.

Quinlin submitted the clothing for testing to Dr. Levine of the Allegheny County Crime Lab.

The prosecutor, Leo Dillon, learned of the existence and location of the clothing through reviewing a taped conversation between Ferri and one Gordon Bennett. After the murder of Heatherington, agents of the Drug Enforcement Administration had approached Bennett, who was suspected of being involved with Ferri's drug distribution network, seeking his cooperation in their investigation. At DEA's behest, Bennett consented to wear a wire.

References to the clothing were also made public in a letter from Ferri to federal district court responding to Sharon's motion to withdrawal as counsel in an unrelated federal case. Statements in the letter included, "you have a set of clothing that I gave you the day after Jocko was shot." (T.C.O. at 21).

Through discovery, the prosecution obtained both the clothing and Dr. Levine's report. Ferri concedes that the clothing itself is not

privileged, and does not contest the propriety of its discovery. *See Commonwealth v. Stenhach*, 356 Pa.Super 5, 514 A.2d 114 (1986) (discusses defense counsel's duty to disclose incriminating physical evidence). He does, however, contest the trial court's decision permitting Sharon and Quinlin to testify. The admissibility of the scientific test of clothing conducted in 1985 and 1987 required the Commonwealth to establish a chain of custody dating back to the day after the shooting. *Commonwealth v. Alarie*, 378 Pa.Super. 11, 547 A.2d 1252 (1988). Without Sharon and Quinlin's testimony, the prosecution would be unable to admit the clothing into evidence. Ferri asserts that attorney-client privilege prevents this testimony.

In *Stenhach*, this court dealt with the defense attorney's duty to disclose incriminating physical evidence. This court struck a balance between the right of the prosecutor to discover the evidence and the attorney-client privilege, holding that, "the

prosecution s entitled to use the physical evidence as well as information pertaining to its condition, location and discovery but may not disclose to a fact-finder the source of the evidence." 356 Pa.Super at 24, 514 A.2d at 123. Ferri claims that permitting his former attorneys to testify as to their possession of the clothing improperly discloses to the finder of fact the source of the evidence, thus violating the privilege. The trial court relying on federal case law, held that any voluntary disclosure by the holder of the privilege that is inconsistent with the confidential nature of the relationship thereby waives the privilege. *U.S. v. Fisher*. 692 F.Supp. 488, 494 (E.D.Pa.1988). The court thus found that Ferri effectively waived any attorney client privilege with his disclosure of his delivery of clothing to third persons, and concluded that due to the waiver of the attorney-client privilege, the *Stenhach* rationale is not applicable to the present case.

Whether Ferri's disclosure to Bennett waived his attorney-client privilege is an issue of first impression in Pennsylvania. However, or Court's resolution of this precise issue with respect to marital privilege guides our discussion. *Commonwealth v. Clark*, 347 Pa.Super. 128, 500 A.2d 440 (1985). The *Clark* court held that the marital privilege survives subsequent disclosures because it is "the relationship that existed at the moment of the communication which society seeks to protect by the privilege, not the substance of the message itself." 347 Pa.Super. at 133, 500 A.2d at 443.

The attorney-client privilege, likewise, seeks to protect a relationship by fostering "a confidence between client and advocate that will lead to a trusting and open attorney-client dialogue." *Estate of Kofsky*, 487 Pa. 473, 482, 409 A.2d 1358, 1362 (1979). The result of a violation of the attorney-client privilege is "damage to the administration of justice." *Id.* Analogous to the marital privilege, it is the

relationship between the attorney and client at the moment of the communication that society seeks to protect. Thus, the holding in *Clark* is equally applicable to prevent waiver of the attorney-client privilege. Ferri argues that without waiver of the privilege, the *Stenhach* holding effectively blocks the Commonwealth from eliciting testimony from either Sharon or Quinlin.

Contrary to Ferri's argument, the underlying rationale of *Stenhach* supports rather than undermines the admissibility of Sharon and Quinlin's testimony. The facts in *Stenhach* were limited to the attorney's duty and subsequent criminal liability for failing to disclose incriminating physical evidence. The case, while discussing questions of admissibility of the attorney's testimony, did not specifically deal with the waiver issue.

Rather, the court in *Stenhach* balanced the prosecution's right to use the physical evidence with the defendant's right to protect the

privileged circumstances surrounding the attorney's possession. In discussing the duty to disclose, the court declined to restrict the Commonwealth's efforts to obtain seizable evidence, "'*merely* because it has been placed in the hands of an attorney. To hold otherwise would mean that a criminal suspect could shield evidence from discovery by the simple and expedient delivery to an attorney, a result we deem patently unreasonable.'" *Commonwealth v. Stenhach*, 356 Pa.Super. at 16-17, 514 A.2d at 120 *quoting In re Gartley*, 341 Pa.Super. 350, 367, 491 A.2d 851, 860 (1985). Permitting the use of the attorney-client privilege effectively to block the admissibility of non-privileged physical evidence, merely because it is placed in an attorney's hands, is a result equally unreasonable.

In *People v. Meredith*, 29 Cal.3d 682, 175 Cal.Rptr. 612 P.2d 46 (1981), the California supreme court dealt specifically with the situation in which it was proper to permit an

attorney's testimony. The court held that when an attorney retrieved abandoned physical evidence, "'he necessarily deprives the prosecution of the opportunity to observe the evidence in its original condition or location. To extend the attorney-client privilege to a case in which the defense removed evidence might encourage defense counsel to race police to seize critical evidence.'" *Stenhach*, 356 Pa.Super. at 19, 514 A.2d at 121, *quoting Meredith*, court permitted the limited testimony of the defendant's attorney as to the evidence's location and condition. Similarly extending the attorney-client privilege to prevent the admissibility of physical evidence might encourage the use of the attorney's office as an evidence depository. This is not the type of exchange between attorney and client that the privilege seeks to foster or protect.

By requiring disclosure but denying testimony as to its source, *Stenhach* balances the right of the Commonwealth to obtain non-privileged

evidence, while respecting privileged communication. In the present case, denying the foundation testimony does not properly balance the respective rights of the parties. Instead, the Commonwealth is effectively denied use of the evidence and non-privileged evidence remains protected. The source of the evidence should be protected, but not at the cost of denying admission of otherwise admissible evidence.

An appropriate balance consistent with *Stenhach* is to limit the testimony to establishing chain of custody. The defense can eliminate the need to call an attorney by stipulating to the authenticity of the physical evidence. *See e.g., People v. Meredith*, 29 Cal.3d 682, 175 Cal. rptr. 612, 631 P.2d 46 (1981). In the present case, a stipulation was offered, but not accepted by defense counsel. The questioning of both Sharon and Quinlin was carefully limited to establishing the chain of custody and authentication of the clothing. The privileged communications remained protected to

the extent possible, while the Commonwealth was permitted to use the non-privileged physical evidence. The trial court, therefore, properly admitted the testimony of Sharon and Quinlin.

[5] The next issue on appeal also pertains to the clothing, that it, whether permitting the infared testing of the clothing for gunpowder during the cross-examination of Ferri's expert witness constituted an unfair surprise and prejudicial error. Dr. Levine testified for the prosecution and opined that the clothes that Ferri wore the night of the murder contained gunpowder. Defense's expert Fassnacht was questioned on direct examination as to the methods used to determine the presence of gunpowder. Mr Fassnacht testified as to the tests employed, and that opined that the tests relied upon by Levine were not dispositive. "You might find something that appears to be gunpowder, but there are other things that might appear to be gunpowder which are not." (N.T June 2-18 at 1599).

On cross-examination the prosecutor questioned Fassnacht on possible alternative methods of testing for gunpowder. The witness agreed that infared testing would be determinative of whether gunpowder was the particle in question. The prosecutor then asked the expert if he would be willing to participate in such a test with Dr. Levine. Fassnacht agreed and the test results conclusively demonstrated that the particle was gunpowder.

Ferri asserts that the tests could have been done prior to trial pursuant to a stipulation between the parties, and that permitting the testing during the defendant's case constituted an unfair surprise. The trial court held that the tests should have been run prior to trial, "but I think we are at the point now where [the] jury ... [would] want to know. They are the fact-finders." (N.T. June 2-18 at 1637). Although a stipulation is mentioned in both counsel's briefs, it is not a fact of record. Accordingly, this court cannot assess

whether the stipulation was breached. *Commonwealth v. Marchesano*, 348 Pa.Super 387, 502 A.2d 597 (1985).

"It is axiomatic that a trial judge has broad powers concerning the conduct of a trial and, particularly with regard to the admission or exclusion of evidence. Controlling cross-examination is likewise within the sound discretion of the trial judge." *Commonwealth v. Niemetz*, 282 Pa.Super. 431, 444-45, 422 A.2d 1369, 1376 (1980). Under the present facts, the Commonwealth laid a proper foundation for the admissibility of the test. *Commonwealth v. McGinnis*, 511 Pa. 520, 515 A.2d 847 (1986). Furthermore, the test is dispositive, and would assist the finder of fact. There is nothing of record to indicate that the trial court abused its discretion in permitting the test or admitting its result.

[6] The fourth issue raised on appeal is whether the trial court erred in holding that Ferri waived his attorney client privilege so as

to permit the testimony of David Arthur Jones. Jones, Ferri's former attorney on several unrelated matters, testified that Ferri directed him to send a letter dictated by Ferri to Pasquale DeStephano in care of the Federal Witness Protection program. Jones refused to comply with Ferri's request as he interpreted the letter as threatening. The trial court permitted this testimony, after first finding that Ferri waived his right to assert attorney-client privilege.

In determining that there was waiver, the court heard conflicting testimony concerning Ferri's response to a subpoena ordering Jones to appear before the Allegheny County Grand Jury. Jones testified at trial that Ferri instructed him to, "go in and tell the truth, tell them the whole truth. I am absolutely innocent of any wrongdoing here, you tell them whatever they want to hear." (N.T. June 2-18, 1987 at 881). Jones also stated that, "I asked him specifically if he authorized me to divulge the

entire communication we had, and he said yes." (N.T. June 2-18 at 1332). The trial court resolved this credibility issue in favor of Jones.

It is not this court's function to weigh evidence or pass on the credibility of witnesses. *Commonwealth v. Jackson*, 506 Pa. 469, 485 A.2d 1102 (1984). After a careful review of the record and the trial court opinion, this court is satisfied that there was neither manifest error, nor a decision that was arbitrary and capricious. Therefore, we are bound by the trial court's determination that, even assuming an attorney-client relationship existed, Ferri waived his privilege.

[7,8] The final issue raised on appeal is whether the trial court erred in admitting a taped conversation between Pasquale DeStephano and Michael Romano. DeStephano testified at trial that prior to the murder, LaRocca solicited him to murder Heatherington. DeStephano told his acquaintance Romano about

LaRocca's offer, and requested that Romano watch his back when he met with LaRocca. Romano informed the DEA of this conversation. After the murder, DEA contacted Romano and requested that he meet with DeStephano, this time wearing a wire to record their conversation. The substance of the conversation included references to the prior solicitation and speculation as to how the murder occurred. Ferri asserts that the contents of the tape are hearsay, and cumulative, and that its probative value does not outweigh its prejudicial effect.

the Commonwealth admitted the tape to corroborate DeStephano's testimony, and to rebut any implication that DeStephano fabricated LaRocca's solicitation. The statements, therefore, were not admitted for the truth of the matter asserted, and are not hearsay. *Commonwealth v. Cohen*, 371 Pa.Super. 558, 538 A.2d 582 (1988). Ferri contends that the evidence is cumulative since the contents of the conversation were elicited from Romano during

his direct examination.[2] The trial court's determination that the evidence was not cumulative will not be disturbed absent abuse of discretion. *Commonwealth v. Stetler*, 494 Pa. 551, 431 A.2d 992 (1981).

[9] Ferri also contends that the tape recording contained references that did not pertain to the existence of the LaRocca solicitation and had no probative value. Appellant further argues that the prejudicial value of the statements speculating as to Ferri's involvement outweighed its minimal probative effect. It is the trial court's function to balance prejudicial effect of evidence against its probative value. The trial court's ruling as to admissibility will not be disturbed absent abuse of discretion *Commonwealth v. Foy*, 394 Pa. Super. 442, 576 A.2d 366 (1990). This court finds no such

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[2] The trial court also permitted the transcript of the tape recording to be read after finding that the recording was, at times, inaudible.

error.

Accordingly for the foregoing reasons the judgment of sentence is affirmed.

(Crest)
The Supreme Court of Pennsylvania
Western District

Charles W. Johns, Esquire, Prothonotary
Irma T. Gardner, Deputy Prothonotary
801 City-County Building
Pittsburgh, Pa. 15219-2463 (412)565-2816

June 10, 1993

Martha E. Bailor, Esquire
GREENFIELD & ASSOCIATES
Greenfield Court, 1035 Fifth Avenue
Pittsburgh, PA 15219

In Re: Commonwealth of Pennsylvania v.
Francis R. Ferri
No. 0354 W.D. Allocatur Docket 1992

Dear Ms. Bailor:

The Court has entered the following Order on your Petition for Allowance of Appeal in the above-captioned matter:

"June 7, 1993 PER CURIAM: Petition denied. Mr. Justice Cappy did not participate in the consideration or decision of this matter."

Very truly yours,

(Signature) Deputy Prothonotary

ITG:abg

cc: Kevin McCarthy, Esq. Asst.D.A.,
Hon. James McGregor

(Crest)
The Supreme Court of Pennsylvania
Western District

Charles W. Johns, Esquire, Prothonotary
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June 10, 1993

Martha E. Bailor, Esquire
GREENFIELD & ASSOCIATES
Greenfield Court, 1035 Fifth Avenue
Pittsburgh, PA 15219

In Re: Commonwealth of Pennsylvania v.
Francis R. Ferri
No. 0354 W.D. Allocatur Docket 1992

Dear Ms. Bailor:

The Court has entered the following Order on your Supplemental Petition for Allowance of Appeal in the above-captioned matter:

"June 7, 1993 PER CURIAM: Supplemental Petition for Allowance of Appeal denied."

Very truly yours,

(Signature) Deputy Prothonotary

ITG:abg

cc: Kevin McCarthy, Esq. Asst.D.A.,
Hon. James McGregor